TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 220 44.

MILTON C. CONNERS, JR., ADMINISTRATOR OF MILTON C. CONNERS, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND THE NORTHERN CHEYENNE INDIANS ET AL.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 29, 1899.

(17,388.)

(17,388.)

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OCTOBER TERM, 1899.

No. 279.

MILTON C. CONNERS, JR., ADMINISTRATOR OF MILTON C. CONNERS, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND THE NORTHERN CHEYENNE INDIANS ET AL.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1900.

1 In the Court of Claims.

MILTON C. CONNERS, JR., Administrator of Milton C. Conners, Deceased, *vs.* THE UNITED STATES and THE NORTHERN Cheyenne Indians, The Northern Band of Northern Cheyenne Indians, The Southern Band of Northern Cheyenne Indians, Dull Knife's Band of Northern Cheyenne Indians, Little Wolf's Band of Northern Cheyenne Indians, The (Southern) Cheyenne and Arapahoe Indians.	No. 1077. Indian Depredation.

I.—*Amended Petition. Filed January* 26, 1898.

(Original petition filed April 27, 1891.)

To the honorable the Court of Claims:

The claimant, Milton C. Conners, Jr., respectfully represents:

I. That he is a citizen of the United States and a resident of Powderville, Montana, and administrator of the estate of Milton C. Conners, deceased.

II. That the following property belonging to decedent, who was at that date a citizen of the United States, was taken or destroyed by Indians of a tribe or nation then in amity with the United States, and who were chargeable for said depredation by reason of a treaty between said Indians and the United States, the date, place, and tribe being particularly stated below:

On the Republican river, in Nebraska, on or about the 3rd day of October, 1878, by Northern Cheyenne Indians, the Northern band of Northern Cheyenne Indians, the Southern band of Northern Cheyenne Indians, Dull Knife's band of Northern Cheyenne Indians, Little Wolf's band of Northern Cheyenne Indians, the
2 (Southern) Cheyenne and Arapahoe Indians.

4 horses at $100 each	$4,500.00
2 mules at $200 each	400.00
33 beef steers at $30 each	1,500.00
	$6,490.00
Deduct 1 mule recovered	175.00
	$6,315.00

III. That a claim for said property, with evidence therein, was presented to the Commissioner of Indian Affairs, the items of said claim being as heretofore stated.

That the following action was taken thereon: Reported by Interior Department to Congress January 13, 1891. Disallowed.

IV. That no other action than as aforesaid has been had on this claim in Congress or by any of the departments; that the claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made; that the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that the claimant is a citizen of the United States, and the claimant believes the facts as stated in this petition to be true.

And the claimant prays judgment upon the facts and the law in the sum of six thousand three hundred and fifteen dollars ($6,315).

WILLIAM B. KING,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am the attorney for the claimant in this case. I have read above petition, and the matters therein stated are true to the best of my knowledge and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 24th day of January, 1898.

S. A. TERRY,
Notary Public.

[SEAL.]

3 II.—*Defendants' Plea.*

Filed January 17, 1898.

MILTON C. CONNERS
vs.
THE UNITED STATES and DULL KNIFE'S BAND OF Northern Cheyennes and The Northern Cheyenne Indians. } No. 1077.

Come defendants, by the Assistant Attorney General, and for plea to the amended petition filed in the above-styled cause say that the claimant should not have and maintain his aforesaid action against them, because they say that the depredation was committed by Dull Knife's band of Northern Cheyenne Indians, as alleged in the said amended petition, which said band was an independent band at the time of the commission of said depredation, and was not on said date in amity with the United States.

And this they are ready to verify.

JOHN G. THOMPSON,
Assistant Attorney General.

HARRY PEYTON, *Ass't Att'y.*

4 In the Court of Claims, Term 1898–'9.

MILTON C. CONNERS, JUNIOR, Administrator of Milton C. Conners, Deceased,
vs.
THE UNITED STATES ET AL. } No. 1077. Ind. Dep.

III.—*Claimant's Replication to Defendants' Plea.*

Filed April 19, 1899.

The claimant, for replication to defendants' plea, says that Dull Knife's band named in said plea did not constitute, as averred in the plea, "an independent band at the time of the commission of the said depredation."

And the claimant further avers that the Indians who committed the depredation complained of were members of a band, tribe, or nation then in amity with the United States; and this claimant is ready to verify.

Wherefore claimant prays judgment, and that the defendants answer over.

WILLIAM B. KING,
Attorney for Claimant.

5 IV.—*Findings of Fact, Conclusions of Law, and Opinion. Filed by the Court March* 21, 1898.

Findings of fact.

I.

At the time of the depredation hereinafter found the claimant was a citizen of the United States, residing in the State of Nebraska. The depredation was committed without cause or provocation on the part of the claimant or his agent in charge and the property has never been returned or paid for.

II.

The depredation was committed on the 1st of October, 1878, by Northern Cheyenne Indians, more particularly described hereafter. The property taken and destroyed consisted of 40 horses, 1 mule, and 40 steers, of the value in the aggregate of $3,750.

III.

In May, 1877, 937 Northern Cheyennes, men, women, and children, were removed from the Red Cloud reservation at Fort Robinson in Nebraska to the Southern Cheyenne and Arapahoe reservation at Fort Reno, in the Indian Territory. The Cheyennes went voluntarily, though reluctantly, relying in part upon representations made to them that the southern reservation would be a desirable home, and in part upon what they understood to be assurances, that

if dissatisfied with it they should be brought back. The body of Indians was composed of subdivisions of the Cheyenne tribe known as the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow. These so-called bands had no autonomy, and had not been recognized either by the Government or by the tribe as separate entities. They were natural segregations of civilized Indians, leading a nomadic life and living in groups in a widely extended habitat. The so-called chiefs were leaders or spokesmen, commonly called head men. The Indians so removed were about one-half of the entire tribe.

On the reservation at Fort Reno, the Cheyennes of Dull Knife's and Little Wolf's bands lived apart from other Indians on the reservation. They were dissatisfied and made repeated applications tothe Government to be brought back to what they termed their native country in the Northwest. No notice being taken of their request, 320 of them broke away from the reservation on September 9, 1878. The commanding officer at Fort Reno sent a military force in pursuit. "The officer in command was particularly instructed if he could induce the Indians to come back without resort to force to do so."

The Cheyennes were overtaken at a point 120 miles distant from Fort Reno. The officer in command summoned them to yield and return to the reservation. Little Wolf, as spokesman for the Cheyennes, replied in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon the Cheyennes, who returned the fire, and then fled and escaped. They made their way across Kansas and Nebraska, twice fighting United States troops and likewise a body of armed citizens who attacked them. In the northern part of Nebraska they were intercepted by other troops, and after some fighting they surrendered on the 3d of October and were taken to Fort Robinson. Shortly before this surrender, Little Wolf with about half of the party had separated from Dull Knife, and he and his party were not included in the surrender. Old Crow and Wild Hog, with some of their bands, accompanied Dull Knife's party in this escape from the Indian Territory. The leading chief was Dull Knife, and the Indians, regarded as a military force, were under his command. The band at the time of the surrender consisted of 49 men, 51 women, and 48 children.

Up to the time these Cheyennes were fired upon in the Indian Territory by the pursuing troops they had committed no atrocity and were in amity with the United States and desired to remain so. After they were fired upon, as before described, their flight was characterized by the usual characteristics of Indian warfare. During the period of this flight—that is to say, between the 9th
6 of September and the 3d of October, 1878—the Northern Cheyennes, both in the Indian Territory and on the northern reservations, were in amity with the United States.

On these specific facts the court finds the ultimate facts, that at the time when the depredation above set forth was committed the tribe of Northern Cheyenne Indians was in amity with the United

States, with the exception of these who composed the bands of Dull Knife and Little Wolf, and that the bands of Dull Knife and Little Wolf were not in amity.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as conclusions of law:

The bands of Dull Knife and Little Wolf, at the time when the depredation was committed, were independent bands of Indians within the intent and meaning of the Indian depredation act, 1891; and the tribe of Northern Cheyennes, the defendants herein, was not responsible for their acts of depredation, and the petition should be dismissed.

Opinion.

NOTT, *Ch. J.*, delivered the opinion of the court:

In May, 1877, the Northern Cheyennes numbered about 1,800 persons. They had borne a distinguished part in the Sioux war of 1876, but had surrendered and made peace with the United States, and were then indeed acting as scouts and soldiers for the Government. In that month 937 were taken to the Indian Territory. The body was said to be composed of Dull Knife's band, of Wild Hog's, of Old Crow's, and of Little Wolf's. The so-called bands were not then bands in a tribal, political, or military sense, but simply parties who lived, as it were, in separate hamlets on the reservation; and the so-called chiefs were without authority, chiefs who could not make war or conclude peace or enter into treaty stipulations, but simply head men, leaders, or spokesmen.

During the previous autumn all of the Northern Cheyennes who had been in arms with Sitting Bull had come in and surrendered except Dull Knife's band.

On the 25th of November, 1876, Colonel Mackenzie had struck the village of Dull Knife with a column led by Indian scouts, many of whom were Cheyennes. The Indians were surprised, and fled among the rocks with nothing but their arms and ammunition and the clothes they wore. The weather was so intensely cold that on the nights of the 25th and 26th fourteen Indian babies were frozen to death in their mothers' arms. Dull Knife and his band made their way to the camp of Crazy Horse, who received them so coldly that they were deeply incensed, and came in and surrendered and turned against Crazy Horse and the remnant of the Ogalallas who were still hostile. During the ensuing winter friendly relations were cultivated by the officers who had fought them. Captain Bourke writes:

One day when the Cheyenne chief Dull Knife was at headquarters, I invited him to stay for luncheon.

"I should be glad to do so," he replied, "but my daughters are with me."

"Bring them in, too," was the reply from others of the mess, and Spotted Tail, who was present, seconded our solicitations; so we

had the pleasure of the company, not only of old Dull Knife, whose life had been one of such bitterness and sorrow, but of his three daughters as well. They were fairly good-looking—the Cheyennes will compare favorably in appearance with any people I have seen—and were quite young; one of nine or ten, one of twelve, and the oldest not yet twenty—a young widow.

Of the other Cheyennes, there was Little Wolf, one of the bravest in fights where all were brave.

This was the condition of Dull Knife's band when the removal to the Indian Territory took place. It had been on the warpath, acting independently of the other members of the tribe, but at the time was merged in the mass of Northern Cheyennes on the reservation, and was with all the others there in amity.

After a year of sickness, misery, and bitterness in the Indian Territory, and repeated prayers to be taken back to the country where their children could live, 320 of them, in September, 1878, broke away from the reservation. Dull Knife and Little Wolf were the leaders of this escaping party, which consisted of their bands.

They were pursued and overtaken. A parley ensued in which Little Wolf, whom Captain Bourke characterizes as "one of the bravest in fights where all were brave," said, "We do not want to fight you, but we will not go back." The troops instantly fired upon the Cheyennes and a new Indian war began.

That volley was one of the many mistakes, military and civil, which have been the fatality of our Indian administration, for the officer who ordered it thereby instituted an Indian war, and
7 at the same instant turned hostile savages loose upon the unprotected homes of the frontier and their unwarned, unsuspecting inmates. The Cheyennes outgeneraled the troops. They fought and fled, and scattered and reunited; they fought other military commands and citizens who had organized to oppose them, and in like manner they again and again eluded their opponents, making their way northward over innumerable hindrances. They had not sought war, but from the moment when they were fired upon they were upon the warpath—men were killed, women were ravished, houses were burned, crops destroyed. The country through which they fled and fought was desolated, and they left behind them the usual well-known trail of fire and blood.

At length, on the 3d of October, 1878, in northern Nebraska, the Cheyennes were brought to bay by troops who intercepted and fought them. They surrendered and were carried as prisoners of war to Fort Robinson, numbering then 49 men, 51 women, and 48 children. The war had ended, but the Cheyennes were able to console themselves with the reflection that the officer who began the war had not been able to carry them back to the reservation; that they had killed Lieutenant-Colonel Lewis, 5 soldiers, and 26 settlers, and that the wives and children of their enemies had suffered more bitterly than their own.

But here a new element comes into the case. Shortly before or after the depredations were committed which are the subject of the present action, but before the final capture of the Indians above re-

ferred to, Little Wolf and his band separated from the others and turned into the mountains. They disappeared then and as a band have never been seen since. Whether they perished during the ensuing winter or made their way northward and merged with other Indians is conjectured. Only thirty are known to have reached the Cheyenne reservation on the Rosebud. Dull Knife and his band were carried to Fort Robinson. There they persistently refused to return to the reservation and were kept in close custody. In January, 1879, orders from the Interior Department arrived at Fort Robinson peremptorily directing the commanding officer to remove them to the reservation. On the 3d of January, 1879, the Indians were told of this, and on the next day gave, through Wild Hog, their spokesman, their unequivocal answer, "We will die, but we will not go back."

The commanding officer apparently shrunk from shooting them down; removing them meant nothing short of that, or of actually carrying each one forcibly to the detested place from which they had escaped. The military authorities therefore resorted to the means for subduing the Cheyennes by which a former generation of animal tamers subdued wild beasts. In the midst of the dreadful winter, with the thermometer 40° below zero, the Indians, including the women and children, were kept for five days and nights without food or fuel, and for three days without water. At the end of that time they broke out of the barracks in which they were confined and rushed forth into the night. The troops pursued, firing upon them as upon enemies in war; those who escaped the sword perished in the storm. Twelve days later the pursuing cavalry came upon the remnant of the band in a ravine 50 miles from Fort Robinson. "The troops encircled the Indians, leaving no possible avenue of escape." The Indians fired on them, killing a lieutenant and two privates. The troops advanced; "the Indians, then without ammunition, rushed in desperation toward the troops with their hunting knives in hand; but before they had advanced many paces a volley was discharged by the troops and all was over." "The bodies of 24 Indians were found in the ravine—17 bucks, 5 squaws, and 2 papooses." Nine prisoners were taken—1 wounded man and 8 women, 5 of whom were wounded. The officer in command unconsciously wrote the epitaph of the slain in his dispatch announcing the result: "The Cheyennes fought with extraordinary courage and firmness, and refused all terms but death." The final result of the last Cheyenne war was, that of the 320 who broke away in September, 7 wounded Cheyennes were sent back to the reservation.

This statement illustrates the extraordinary difficulties which the court has had to encounter in dealing with these Indian depredation cases. The United States are liable only as guarantors where the Indians are known, and there must primarily be a judgment against such Indian defendants which the United States undertake to pay if it cannot be collected from the Indian judgment debtors. In this case, if these bands of Dull Knife and Little Wolf are to be regarded as responsible entities and as the proper Indian defendants

against whom a judgment should be rendered, and this were an ordinary suit at law, there would really be no defendant before the court, for these bands had utterly ceased to exist before the suit was brought.

These Indians, indeed, in 1878, occupied an anomalous position unknown to the common or the civil law, or to any system of municipal law. They were neither citizens nor aliens; they were neither free persons nor slaves; they were the wards of the
8 nation, and yet, on a reservation under a military guard, were little else than prisoners of war while war did not exist. Dull Knife, and his daughters, could be invited guests at the table of officers and gentlemen, behaving with dignity and propriety, and yet could be confined for life on a reservation which was to them little better than a dungeon on the mere order of an executive officer.

It has been argued in this case with great earnestness that these Cheyennes had a lawful right to leave the reservation and travel peaceably back to their old homes; that they did not begin the conflict and merely resisted force by force; that their acts were lawful and the action of the pursuing troops unlawful. But it is impossible to define their status from a legal point of view. Whether they could have sued out writs of *habeas corpus* and been set free by judicial authority it is not for this court now to decide. For the purposes of the jurisdictional statute it is enough to say that after they were first fired upon they were not in amity. If their action was lawful and the acts of the military were unlawful, those circumstances make the cause of war more justifiable and pronounced.

It has also been urged that certain appropriations made by Congress granting relief to some of the victims of these depredations committed by Dull Knife's band, and directing that the payments be charged to and deducted from moneys which might otherwise be paid to the "Northern Cheyenne and Arapahoe Indians," is a legislative recognition of the then existing unity of the Northern Cheyenne tribe and of Dull Knife's band as individuals of the tribe. But Congress have, by the subsequent jurisdictional act, authorized the Northern Cheyennes to come into this court and have their rights and liabilities judicially determined. A primary question in their case is whether they were legally responsible for the acts of certain hostile Indians. That question is a judicial question, and consequently one which the court must decide irrespective of legislative action. The recognition of bands and tribes by the political branches of the Government must be contemporaneous. The legislative action above referred to was *ex post facto*. *Acts 17th of May*, 1882, and *4th July*, 1884 (22 Stat. L., p. 86; 23 *id.*, 95). Congress, with such light upon the case as then existed, endeavored to do justice in the premises; but the subsequent statute, the jurisdictional act, has transferred that duty to the judiciary.

The court regards these two bands as having been Indian entities and proper defendants in these cases within the intent of the decisions in *Montoya v. The Mescalero Apaches* (32 C. Cls. R., 249) and *Herring v. The Ute Indians* (*ib.*, 536). The bands of Little Wolf and

Dull Knife were not so large, and the objects for which they existed were not so well defined as those of Victoria and Black Hawk, but nevertheless were operating as independent bodies, distinct from and irrespective of all other Indians. Moreover, their acts were acts of war. It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States, but it was the case of an entire body waging armed resistance with all its might and with all the ferocity of Indian warfare against whatever power the United States could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States on the assumption that they were escaping prisoners of war refutes the idea of a pre-existing condition of amity and renders it preposterous.

In 1878 the Northern Cheyennes no longer existed as an entire body or as a responsible tribe. Half of them had been carried south to the Indian Territory and half westward to the headwaters of the Rosebud, and these two bands, headed by Little Wolf and Dull Knife, after they broke away from the reservation, belonged to neither half. The Cheyennes who remained in the Indian Territory could exercise no control over them; the Cheyennes on the Rosebud had been permanently separated from them. To hold these warring elements of an Indian band, which were then isolated and in active hostility, as nothing more than a number of individual Indians not at war but engaged in personal plunder while their tribe remained at peace would be to defeat the purpose of all and each of the Indian indemnity acts. It is indeed most unfortunate that the unhappy frontiersman must suffer without remedy where the atrocities were greatest, while others can recover in other cases where the wrong done them was less; but nevertheless it must be held that if officers or agents or citizens of the United States drive a tribe or band of Indians into a state of war the tribe or band cannot be held liable for the obligations which would rest upon them if they were enjoying the blessings of peace and remaining in amity with the United States; and it must likewise be held that where the United States engage in war with a distinct portion of a tribe, acting independently of the tribe, over which the tribe can exercise no control, being in fact a distinct military command, the tribe in amity cannot be held responsible for the acts of the hostile Indians.

The judgment of the court is that the petition against the United States and the Cheyenne tribe be dismissed; and that the petition against the United States and Dull Knife's band and Little Wolf's band be dismissed for want of jurisdiction.

9 V.—*Claimant's Motion for New Trial.*

Filed April 2, 1898.

MILTON C. CONNERS, Adm'r of Milton C. Conners,
vs.
THE UNITED STATES and THE NORTHERN Cheyenne Indians.
} No. 1077. Ind. Dep.

Comes the claimant, by his attorney, and moves the court for a new trial of this cause upon the following assignments of error:

I. The court erred in its finding that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow, by members of which the depredation in this case was committed, were bands within the meaning of the act of March 3, 1891.

II. The court erred in its finding that, though the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow had no autonomy and had not been recognized either by the Government or by the tribe as separate entities and were but "natural segregations of civilized Indians," they constituted a band or bands within the meaning of the act of March 3, 1891, having the capacity for hostility.

III. The court erred in its finding that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow were at the time the depredation was committed "independent bands of Indians within the meaning of the Indian depredation act of 1891."

IV. The court erred in its finding that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow were hostile to the United States at the date of the depredation alleged.

10 V. The court erred in its finding that the Northern Cheyenne tribe of Indians, whose members committed this depredation, and which the court declared to have been in amity with the United States at the date thereof, is not responsible for the depredations committed by the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow, and is not liable to answer the claimant in this demand.

Wherefore the court is asked to grant a new trial in this case.

WILLIAM B. KING,
Attorney for Claimant.

11 VI.—*Stipulation.*

Filed April 24, 1899.

In the Court of Claims.

MILTON C. CONNERS, JR., Adm'r of Milton C. Conners, Deceased,
vs.
THE UNITED STATES ET AL.
} No. 1077. Ind. Dep.

It is hereby stipulated and agreed, for the purpose of preventing any question as to the right of appeal in this case, that the judgment

against the claimant on the 21st day of March, 1898, dismissing the petition may be set aside upon the motion for new trial already filed by the claimant in due time, and that a new judgment, precisely like the present judgment, may be entered against the claimant of the same date as the order setting aside the present judgment, and from this an appeal is to be taken to the Supreme Court.

WM. B. KING,
Attorney for Claimant.
JOHN G. THOMPSON,
Assistant Attorney General.

12 VII.—*Judgment of the Court and Allowance of Appeal.*

MILTON C. CONNERS, JUNIOR, Administrator,
vs.
THE UNITED STATES ET AL. } No. 1077. Indian Depredation.

At a Court of Claims held in the city of Washington on the 24th day of April, 1899, judgment was ordered to be entered up as follows:

By stipulation of the parties, the judgment rendered herein on the 21st day of March, 1898, is hereby set aside, and it is ordered that the petition against the United States and the Cheyenne tribe of Indians be dismissed, and that the petition as to the United States and Dull Knife's band and Little Wolf's band be dismissed for want of jurisdiction.

And upon application this day filed, made in open court, an appeal by the claimant to the Supreme Court of the United States from this judgment is allowed.

BY THE COURT.

13 In the Court of Claims.

MILTON C. CONNERS, JR., Administrator of Milton C. Conners, Deceased,
vs.
THE UNITED STATES and THE NORTHERN Cheyenne Indians, The Northern Band of Northern Cheyenne Indians, The Southern Band of Northern Cheyenne Indians, Dull Knife's Band of Northern Cheyenne Indians, Little Wolf's Band of Northern Cheyenne Indians, The (Southern) Cheyenne and Arapahoe Indians. } No. 1077. Ind. Dep.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 28 day of April, A. D. 1899.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No., 17,388. Court of Claims. Term No., 279. Milton C. Conners, Jr., administrator of Milton C. Conners, deceased, appellant, *vs.* The United States and The Northern Cheyenne Indians *et al.* Filed April 29th, 1899.